Protective measures against recovery proceedings

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Introduction

The brunt of the global pandemic has been suffered by all business entities irrespective of their size or market share. Though the hardships have been suffered by all, it would not be farfetched to say that the deepest impact was felt by borrowers/debtors (especially corporate borrowers) that were inherently staring at liquidity crises and a consequential effect on their repayment ability. Presently, not only does that mean they are exhausting their resources in ensuring their debt repayment and liquidity maintenance, most of these borrowers are grappling 'incipient stress' and are at the verge of defaulting and consequentially being classified as a non-performing asset ("**NPA**") by their lenders.

The present (intended four part) series of articles analyses and suggests different strategies/measures that corporate borrowers may prefer in order to logically counter against, or mitigate the exposure (including auction proceedings/security enforcement) arising from, recovery proceedings when benchmarked against the restructuring framework and the action taken by borrowers towards restructuring.

In this part of (the intended) four part series of articles on this subject, we have explored the interplay between recovery and restructuring and the degree of effectiveness and stability that commercially viable restructuring proposals may bring to a rapidly deteriorating lender-borrower relationship that has taken the (ugly) path of recovery.

What is debt restructuring?

The Reserve Bank of India ("**RBI**")[1] defines 'restructuring' as an act in which a lender, for economic or legal reasons relating to the borrower's financial difficulty, grants concessions to the borrower. Such an act may involve modification of terms of the advances/securities, which would generally include alteration of payment period/payable amount/instalments/rate of interest, roll over of credit facilities, sanction of additional credit facility/release of additional funds for an account in default to aid curing of default/enhancement of existing credit limits, compromise settlements where time for payment of settlement amount exceeds three months.

[1] Paragraph 1 of Annex – 1 to the '*Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions*' dated June 7, 2019.

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The objective of RBI's restructuring measures

Both big and small corporates heavily rely upon financial debts *i.e.* lending facilities/borrowings from banks for meeting their capital expenditure/working capital requirements, expanding their business or making any profitable investment. The plain truth is that, owing to a variety factors (some within the control of borrowers, some outside), not every financing yields the results intended in terms of growth of the business causing delinquencies as regards borrowers and erosion of value of loan assets in the hands of lenders. Needless to mention, a continuous default in repayments of the debt liability renders the accounts of the borrower to be classified as an NPA.

RBI has, from time to time, come up with measures to cater to such situations. Relying on its powers, RBI has issued both prudential norms as well as restructuring guidelines with a view to tackle the issue at both ends of the spectrum.

In this part, in the context of the present framework for restructuring, we analyze some of the aspects that could perhaps be clarified with greater precision and, pending such clarification, how these aspects could be weaved into tenable defences by defaulting borrowers.

Restructuring – A quick overview in terms of timelines

1. **23.08.2001**[2]: Various companies in India were facing enormous financial stress and were unable to pay their financial obligations due to inadequate income or revenue. An emergent need for an appropriate mechanism for corporate debt restructuring, similar to the mechanism prevalent in the United Kingdoms, Thailand, Korea, Malaysia etc., was felt and the Government of India pursuant to various extensive discussions with the RBI, banks and financial institutions, formulated a scheme of corporate debt restructuring ("**CDR"**) which essentially provided for a voluntary, non-statutory restructuring system based on a Debtor and Creditor Agreement and Inter Creditor Agreement.

2. **17.12.2002**: Government of India enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI"**) allowing financial institutions, in consonance with the provisions of SARFAESI, to effect change in management have assets of borrowers attached without any interference from the judicial system and settle their dues.

3. **05.02.2003**[3]: The guidelines for the CDR were revised to make the then existing mechanism more efficient based on the recommendations and suggestions of the Working Group headed by Mr. Vepa Kamesam, the then Deputy Governor, RBI, by extending the scope of the erstwhile CDR framework on 'doubtful loans'.

4. **10.11.2005**[4]: Based on the recommendations of a Special Group, headed by Mrs. Shyamala Gopinath, the then Deputy Governor, RBI, the CDR framework underwent major modifications to facilitate timely and transparent mechanism for restructuring of debts of viable corporate entities affected by various internal or external factors, outside the

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[2] Reserve Bank of India notification titled '*Corporate Debt Restructuring (CDR)*' bearing BP.BC. 15 /21.04.114/2000-01.

[3] Reserve Bank of India notification titled '*Corporate Debt Restructuring (CDR)*' bearing DBOD. No. BP.BC.68/21.04.132/2002-03.

[4] Reserve Bank of India notification titled '*Revised guidelines on Corporate Debt Restructuring*' bearing RBI/ 2005-06/ 206 DBOD.No.BP.BC. 45 / 21.04.132/ 2005-06.

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purview of Board of Industrial and Financial Reconstruction, Debts Recovery Tribunal and other legal proceedings.

5. **27.08.2008**[5]: Fresh guidelines titled '*Prudential Guidelines on Restructuring of Advances by Banks*' were issued by the RBI which superceded all the then existing guidelines concerning corporate restructuring ("**Prudential Guidelines on Restructuring"**). Notably, the value of assets and cash flow generation ability of the borrower were taken into account for restructuring of advance under the Prudential Guidelines on Restructuring.

6. **26.02.2014**[6]: RBI issued '*Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP)*' ("**JLF Guidelines**"). The JLF Guidelines were the first guidelines that detailed methodology and norms for restructuring of advances under sole banking as well as multiple/consortium arrangements even for creditors that were not part of CDR system. The JLF Guidelines reflected the increased autonomy RBI intended to confer on lending institutions as most previous frameworks required affirmation by specially constituted Empowered Groups/Core Groups[7].

7. **08.06.2015**[8]: RBI issued the '*Strategic Debt Restructuring Scheme*' whereunder it provided for converting loans dues to the lenders into equity shares and banks could effect change in management as a part of the restructuring process.

8. **24.09.2015**[9]: RBI issued the '*Prudential Norms on Change in Ownership of Borrowing Entities (Outside Strategic Debt Restructuring Scheme)*' through which it further enhanced banks' ability to bring in a change in ownership of borrowing entities by way of sale of the borrower to a new promoter, shares acquired by invocation of pledge or by conversion of debt of the borrower into equity outside SDR, or bringing in a new promoter by issue of fresh shares or acquisition of the borrowing entity.

9. **13.06.2016**[10]: RBI issued the '*Scheme for Sustainable Structuring of Stressed Ass*ets' in furtherance of its intentions of strengthening the lenders' ability to deal with stressed assets ("**S4A Guidelines**"). S4A Guidelines allowed the lenders to speed up the asset recovery process and also to manage their non-performing assets. S4A Guidelines allowed a promoter to hold the majority shares in the borrower company or the same to be replaced by a new promoter through a resolution plan.

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[5] Reserve Bank of India notification titled '*Prudential Guidelines on Restructuring of Advances by Banks*' bearing RBI/2008-09/143 DBOD.No.BP.BC.No.37 /21.04.132/2008-09.

[6] Reserve Bank of India notification titled '*Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders*' Forum (JLF) and Corrective Action Plan (CAP)' bearing RBI/2013-14/503 DBOD.BP.BC.No.97/21.04.132/2013-14.

[7] Reserve Bank of India notifications on Corporate Debt Restructuring dated 23.08.2001, 05.03.2003, the '*Revised guidelines on Corporate Debt Restructuring*' dated 10.11.2005 and the Prudential Guidelines on Restructuring dated 27.08.2008.

[8] Reserve Bank of India notification titled '*Strategic Debt Restructuring Scheme*' bearing RBI/2014-15/627 DBR.BP.BC.No.101/21.04.132/2014-15.

[9] Reserve Bank of India notification titled '*Prudential Norms on Change in Ownership of Borrowing Entities (Outside Strategic Debt Restructuring Scheme)*' bearing RBI/2015-16/187 DBR.BP.BC.No.41/21.04.048/2015-16.

[10] Reserve Bank of India notification titled '*Scheme for Sustainable Structuring of Stressed Assets*' bearing RBI/2015-16/422 DBR.No.BP.BC.103/21.04.132/2015-16.

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10. **12.02.2018**[11]: RBI consolidated and subsumed[12] all the guidelines issued previously through the *Resolution of Stressed Assets – Revised Framework* ("**Resolution Framework**") and made it mandatory for all banks and financial institutions to initiate corporate insolvency resolution plan ("**CIRP**") against defaulting companies having a loan exposure of more than Rs. 2000 Crore, if the banks failed to implement a resolution plan within 180 days of such default. The Resolution Framework also brought the banks under the obligation to identify and classify stressed assets as Special Mention Account (SMA), immediately on default and that even a single day's default of the repayment schedule would require reporting to the RBI and implementation of resolution plan. It is noteworthy to mention that within the Resolution Framework, the RBI introduced, a system to check/ensure the degree of safety regarding timely servicing of financial obligations by a borrower. The ICE symbols referred to as RPs, in this mechanism range from 1 to 7 (i.e. RP1 to RP7) denoting borrowers with lowest to highest risk respectively.

11. **02.04.2019**: *The Resolution Framework was struck down by the Hon'ble Supreme Court of India in Dharani Sugars and Chemicals Limited v. Union of India*[13] on the ground, *inter alia*, of being *ultra vires* Section 35AA of the Banking Regulation Act, 1949.

12. **07.06.2019**[14]: RBI issued the '*The Reserve Bank of India* (*Prudential Framework for Resolution for Stressed Asset) Directions, 2019*' replacing the earlier issued Resolution Framework. For the purposes of this Article, the said Directions are called **"Prudential Framework"**.

13. **06.08.2020**[15]: RBI issued the '*Resolution Framework for COVID-19 related stress*'("**COVID Resolution Framework**") as an extended arm of the Prudential Framework to address the financial stress and the impact on the long term viability of various corporate entities caused by the economic fallout on account of the novel coronavirus ("**COVID-19**") pandemic. Following the COVID Resolution Framework, RBI issued '*Resolution Framework for COVID-19 related Stress – Financial Parameters*' dated 07.09.2020 wherein it introduced sector specific benchmarks for parameters required to be factored in the resolution plans[16] thereby irrevocably and indisputably establishing a direct nexus between the ability of a borrower to generate cash flows on the strength of assets and lenders' inclination to consider restructuring.

Applicability of prudential framework

Applicable to:

- Scheduled commercial banks (excluding regional rural banks);

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[11] Reserve Bank of India notification titled '*Resolution of Stressed Assets – Revised Framework*' RBI/2017-18/131 DBR.No.BP.BC.101/21.04.048/2017-18.

[12] Paragraph 19 of the *Resolution of Stressed Assets – Revised Framework* dated 12.02.2018.

[13] 2019 SCC OnLine SC 460.

[14] Reserve Bank of India notification titled '*Reserve Bank of India (Prudential Framework for Resolution for Stressed Asset) Directions, 2019*' bearing RBI/2018-19/203 DBR.No.BP.BC.45/21.04.048/2018-19.

[15] Reserve Bank of India notification titled '*Resolution Framework for COVID-19 related stress*' bearing RBI/2020-21/16DOR.NO.BP.BC/3/21.04.048/2020-21.

[16] Reserve Bank of India notification titled '*Resolution Framework for COVID-19 related Stress – Financial Parameters*' bearing RBI/2020-21/DOR.NO.BP.BC/13/21.04.048/2020-21.

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- All India term financial institutions (National Bank for Agriculture and Rural Development, National Housing Bank, Export-Import Bank of India and Small Industries Development Bank of India);
- Small finance banks; and
- Systemically important non-deposit taking non-banking financial companies (NBFC-ND-SI) and deposit taking non-banking financial companies (NBFC-D).

Not applicable upon:

- where the RBI has already issued instructions to banks for initiation of insolvency proceedings against specific borrowers;
- in cases of deferment of date of commencement of commercial operations in case of projects under implementation; and
- in cases of restructuring of loans in the event of a natural calamity.

Loose ends under prudential framework and consequential defences

Unlike its last valid predecessor (i.e. the JLF Guidelines), the Prudential Framework does not mandate lenders to rule out rectification and restructuring in respect of a borrower's account before resorting to recovery proceedings.

This becomes apparent from the following:

- **Paragraph 29 of the Prudential Framework**: The said paragraph contains the repeal provision (*qua* prior restructuring guidelines) but appears to have consciously omitted the expression 'subsumed'[17] with the resultant implication that the well-established principle of having to rule out rectification and restructuring prior to recovery is lost; and

- **Paragraph 9 of the Prudential Framework**: The said paragraph confers complete flexibility/discretion on lenders to proceed with recovery or restructuring as could be discerned/relied upon by lenders based on the following text: "*During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. The lenders may also choose to initiate legal proceedings for insolvency or recovery*".

Now, based on the Prudential Guidelines on Restructuring (as also reflected in Prudential Framework, the JLF Guidelines and S4A Guidelines) the interlink between cash flow generation and restructuring cannot be understated. Restructuring would likely be rendered infructuous if recovery were to be proceeded with simultaneously as there will likely be no assets left on the basis of which restructuring (linked to revenue generation) may be considered.

At least in terms of the Prudential Framework, therefore, there is no express compulsion that requires lenders to not take recovery action when a restructuring proposal is pending before them. In this regard, outlined hereinafter are certain principles that can be relied upon by defaulting borrowers to counter recovery proceedings:

[17] *Anil Naidu vs. Reserve Bank of India,* W.P. No. 9939/2018: "*18. The word "subsumed" can thus be interpreted to mean that super majority voting mechanism which is contemplated in RBI Circular dated 5.5.2017 on 'Timelines for Stressed Assets Resolution" (supra) issued after enactment of IBC code and mentioned at Sr. No. l of Annexure -3.g., 'List of Circular repealed', is also "subsumed" and can thus be considered as retained, or shall be made applicable in the Revised Framework as well*".

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Recovery and restructuring cannot go hand in hand

In order to plead and argue this, what is of foremost importance is that the interlinkage between continuous and unfettered/unencumbered operation (leading to cash flow generation) and restructuring is first established. For this, reliance may be placed on various guidelines of RBI including the Prudential Framework, JLF Guidelines and Prudential Guidelines on Restructuring of Advances. Specifically on this subject, by way of example, a conjoint reading of Paragraphs 7 and 8 of the Prudential Guidelines on Restructuring clarify that value of assets and cash flow generation ability of the borrower shall be taken into account for restructuring of advance. It is noteworthy to mention that RBI had once again underlined the importance of cash flow generation for any assessment/decision to be made by lenders in granting concessions, as evident from the Resolution Framework for COVID-19 related Stress – Financial Parameters dated 07.09.2020.

The next limb in this argument would be to show how recovery and restructuring are antithetic to each other. There are few judicial precedents on this aspect that have useful observations that may come to the aid of defaulting borrowers:

- *IDFC Bank Limited vs. Ruchi Soya Industries Limited*[18]: The Hon'ble Bombay High Court held that lenders may take appropriate legal steps as and by way of recovery process but the same may be decided only after rectification and restructuring are not found feasible, with a view to optimizing the efforts and results. If the recovery process is allowed to be proceeded with at a stage when the process of rectification or restructuring is being considered, the entire process of revival of the borrower by way of restructuring would be adversely affected.

- *Built Graphics Limited vs. Reserve Bank of India*[19]*:* The Hon'ble Delhi High Court through its interim orders dealing with the aforementioned concept, merited the arguments taken by the Petitioner and precluded IDBI to proceed with under Section 7 of the Insolvency and Bankruptcy Code, 2016, from exercising its rights *de hors* the directives issued by the RBI.

- *Lakshmi Energy and Foods Limited vs. Reserve Bank of India and Ors.*[20]: The Hon'ble Delhi High Court was pleased to hold that an approved restructuring plan constitutes a binding agreement between the parties of such plan.

Review period under prudential framework – Are lenders accountable?

- The Prudential Framework provides for a 30 (thirty) day review period before classifying the stressed borrower account as NPA.

- However, the Prudential Framework is silent on whether or not any decision making ought to be made known to borrowers. Can borrowers be dealt *fait accompli* without even being prepared for what they are being held accountable/liable for? It is pertinent to note that lenders proceed to declare the account of the borrower as fraud for defaulting in loan repayment arbitrarily, under to the RBI's '*Master Directions on Frauds – Classification and Reporting by commercial banks and select FIs*'[21], a declaration having criminal

[18] 2017 SCCOnline Bom 153
[19] W.P(C) 1426/2018, order dated 23.11.2018.
[20] W.P(C) 5555/2018.
[21] Reserve Bank of India notification '*Master Directions on Frauds – Classification and Reporting by commercial banks and select FIs* ' bearing RBI/DBS/2016-17/28 DBS. CO. CFMC. BC. No. 1/23. 04. 001/2016-17.

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implications upon borrowers, without following the principles of reasonableness and natural justice.

- Ideally, the Prudential Framework ought to have provided for minimizing of records of all meetings where the lenders met and actively considered recovery or restructuring of the borrower's account. Additionally, stressed borrower also ought to have a right to seek the minutes of meetings form such lenders (specially public sector undertakings which are bound to uphold the principles of reasonableness (anti-thesis to arbitrariness) in all their dealings in view of public interest) to ascertain whether the proposal was considered or not and what improvements, if any, could be made so as to meet the desired benchmarks. Such decisions ought to be, at the very least, well-documented.

- It is pertinent to note here that time and again, various courts have granted their indulgence in situations wherein the lenders have dragged their feet over a restructuring proposal pending before them under the garb of considering the same and deliberately violated the prescribed timelines and proceeded for recovery its borrowers[22].

- Furthermore, it was held by the Hon'ble Punjab and Haryana High Court in *Kumar Hotels & Restaurants vs. Indian Overseas Bank & Ors.*[23] that any decision by administrative, quasi-judicial body or an instrumentality of the State has to be well reasoned and backed by the due consideration and in adherence to the principles of natural justice and fairness.

<u>Inconsistency with the Insolvency and Bankruptcy Code, 2016 ("IBC")</u>

- It is also pertinent to note that lenders nowadays are more inclined towards initiating action under IBC mainly because, for want of a better expression, a judicial body's 'affirmative stamp' is affixed on the resolution plan, and lenders can seek shelter thereunder.

- The primary test (from a financial assessment perspective) under the IBC appears to be the evaluation matrix (a tool designed for a resolution professional to rank the resolution plan and provide guidelines for successful and acceptable resolution plans, it provides various parameters and the manner of applying such parameters, as approved by the committee of creditors, for consideration of resolution plans for its approval[24]) which comprises, amongst other things, the Net Present Value ("**NPV**") of continuing portion of debt inclusive (both interest and principal)[25].

- Under the Prudential Framework, RBI mandates (atleast purportedly) an objective parameter for resolution, that is, the borrowers are required to obtain a credit opinion of RP4[26] or better for the residual debt from one or two credit rating agencies in respect of a resolution plan, and only thereafter can any resolution plan be considered for implementation. Whether this threshold under RP4 (as regards degree of risk) is increased or decreased in unclear due to the words used to define RP4 in the Prudential Framework.

[22] It is pertinent to note that by submitting a restructuring proposal, though any other defence may not be available to the borrowers, Courts may still direct banks to consider such proposals provided borrowers can show that a higher value can be recovered by way of restructuring.
[23] AIR 2012 P&H 167.
[24] IBBI on Model Evaluation Matrix.
[25] Regulation 2 of IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018
[26] Annex-2 of the Prudential Framework that provides list of RP symbols that can be provided by CRAs as ICE and their meanings

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- It is still unclear as to how RP4[27] is comparable to NPV unless the yardstick followed in case of RP4 is quicker and higher upfront recovery under IBC. If this is the test, it is abject for a borrower that may offer, for instance, 20% percent better NPV but its proposal doesn't meet the RP4 parameter, to then watch events unfold as banks may accept a lower amount/NPV under IBC merely because there is judicial affirmation involved in that process.

- Looking at this from a borrower's perspective, a proposal that inherently carries better NPV is presented but fails to meet RP4 parameter. Firstly, the basis of, and comfort extended by, an RP4 rating is itself debatable. Secondly, a restructuring proposal (presented under the aegis of the Prudential Framework) may mean quicker recovery of a higher amount. However, merely because RP4 is not met as a parameter, the lenders may accept a significantly lower amount under the IBC from any person (whose antecedents and ability to service debt are not tested) on the basis of the NPV? When all of this is viewed from the prism of accountability of 'State' run institutions and the fact that we are speaking of public money, the wisdom and truth gets murkier.

- While it is understandable that the objective is to avoid placing a borrower in the hands of chronic defaulters[28], that test is already a part of Prudential Framework (Paragraph 24 of Annexure I to the Prudential Framework). Under the Prudential Framework, borrower may present proposal itself or have settlement/change in management arranged through investor with higher recovery/better NPV but will still not pass muster as RP4 may not be met.

- One can easily, upon a perusal of the foregoing paragraphs, compare the net present value for the evaluation matrix with RP4 and point out that the value/cash inflow that shall be brought into the through the resolution applicant under IBC will though be included in the evaluation matrix, would be subject to various variables under RP4 and restructuring under the Prudential Framework. However, the fact that RP4 is not a test under IBC whereas provisioning for lenders in IBC process is dealt with in the Prudential Framework is itself arbitrary and (potentially) a reasonable ground for borrowers to consider arguing before Courts.

Summary of defences and conclusion

With a view to recap and encapsulate the key aspects of this Article, the following could potentially be relied upon by defaulting borrowers as defences:

- Restructuring and Recovery cannot go hand in hand (*IDFC Bank Limited vs. Ruchi Soya Industries Limited*[29]);

- Unreasoned rejection of Restructuring Proposals (*Kumar Hotels & Restaurants vs. Indian Overseas Bank & Ors.*[30]);

[27] RP4 as per the Prudential Framework is defined as "*Debt facilities/instruments with this symbol are considered to have moderate degree of safety regarding timely servicing of financial obligations. Such debt facilities/instruments carry moderate credit risk*".

[28] In the matter of *Swiss Ribbons Private Limited vs. Union of India,* Writ Petition (Civil) No. 99 of 2018, the Hon'ble Supreme Court of India upheld the validity of Section 29A of IBC which enumerates persons who cannot be resolution applicant.

[29] *Supra*

[30] *Supra*

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- The timelines prescribed by the RBI help in determining whether a debtor or its lenders are sincerely willing to move the restructuring process forward and ultimately reach closure on a restructuring plan or are merely dragging their feet, and if that is the case, then delays by the lenders are greatly detrimental to the borrower and require urgent indulgence by an authority of law;

- No decision making evident in the Review Period prescribed by the RBI. Neither any clause to mandate PSU Lenders to provide details/reasons to a borrower for sitting over a plan and not considering the same; and

- The fact that RP4 under the Prudential Framework is not a test under the proceedings of IBC whereas provisioning for lenders in IBC process is dealt with in the Prudential Framework.

Above mentioned defences can be relied upon based on facts and circumstances of each case but we may add that some of these arguments may stand a higher chance of success before a Constitutional Court than a Tribunal.

That said, as per *Authorized Officer, State Bank of Travancore v. Mathew K.C.*[31], the Hon'ble Supreme Court has cautioned writ courts from interfering with processes initiated by the lenders/borrowers under the provisions of SARFAESI. Accordingly, when faced with incipient stress, it is imperative that borrowers plan commercial reconstruction and legal measures simultaneously and plan sufficiently in advance the strategy to be followed.

The aforesaid defences are only indicative in nature and may vary depending upon facts and circumstances of each case. Although, these arguments may be taken in before any court of law, it is not necessary that a borrower will succeed in any or all of the aforesaid arguments.

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[31] 2018 (3) SCC 85.

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